No. 90-575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TIGER INN,

Petitioner,

—v.—

SALLY FRANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF *AMICUS CURIAE* NATIONAL INTERFRATERNITY CONFERENCE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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INTEREST OF *AMICUS CURIAE* NATIONAL INTERFRATERNITY CONFERENCE

The National Interfraternity Conference ("NIC") was founded in 1909 as an organization for national and international men's college social fraternities. It is presently composed of 59 such fraternities with approximately 5600 chapters and colonies at nearly 900 colleges and universities; those chapters and colonies have approximately 400,000 active student members and nearly four and one-half million alumni. NIC, *Annual Report 1989*. The vast majority of the student members belong to chapters and colonies at campuses in the United States (fewer than 100 of the chapters and colonies are in Canada).

Of the approximately 5600 student groups, all but 32 are affiliated with the 58 NIC member fraternities that restrict their membership to men. A significant number of the groups have similar or even closer relationships with their "host" institutions than the eating clubs' relationship with Princeton University that is the factual basis for the judgment and opinion of the Supreme Court of New Jersey in this case. *See, e.g., Baird's Manual of American College Fraternities* 10-11, 23, 45-244 (19th ed. 1977); Comment, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 Calif. L. Rev. 2117, 2137-39 (1987). Furthermore, that judgment and opinion, in prohibiting the eating clubs from restricting their membership to men, applied an anti-discrimination statute similar in relevant respects to statutes in a majority of the states. *See, e.g.*, Comment, *Discrimination on Campus*, *supra*, at 2124-26. Thus, the decision provides a precedent that threatens the membership practices of thousands of the student chapters and colonies of the NIC member fraternities, to which hundreds of thousands of members of those fraternities belong.

SUMMARY OF ARGUMENT

College student organizations such as Princeton's eating clubs and the nation's fraternities and sororities are entitled to the protection of the federally guaranteed right of private association. The decision by the Supreme Court of New Jersey in this case refused to recognize that entitlement. Its conclusion that the eating clubs' relationship with Princeton University precludes them from being a private association is both unsupported by the federal cases cited to support that conclusion and conflicts with the implications of this Court's decision in *Healy v. James*, 408 U.S. 169 (1972).

The decision below and the potential cost of fighting its extension to thousands of similar college student groups across the country present a grave threat to the right of private association at the nation's colleges and universities.

ARGUMENT

POINT I

The Decision of the Supreme Court of New Jersey Conflicts With Federal Law As Applied in Prior Decisions of This Court And Lower Federal Courts.

This Court's decision in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and its legion of progeny have established that the Bill of Rights of the United States Constitution guarantees and protects the right to freedom of association. This right extends to college students in their campus organizations. *Healy v. James*, 408 U.S. 169 (1972).

More recently, this Court has defined the freedom of association to include a right of private association, which protects groups that are congenial, relatively small, selective in their membership practices, and secluded from non-members in critical aspects of the association. *See Board of Directors v. Rotary Club*, 481 U.S. 537, 546 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984).

College social organizations such as the Princeton eating clubs and the nation's fraternities and sororities are paradigms of such groups, matching well each of these criteria, as commentators have nearly unanimously concluded. *See* Harvey, *Fraternities and the Constitution: University-Imposed Relationship Statements May Violate Student Associational Rights*, 17 J.C.U.L. 11, 23-26 (1990); Jones, *The Future of Single Sex Fraternities*, Fraternal Law, January 1988, at 1, 3-4; Harmon, *Single Sex Status of Fraternities*, Fraternal Law, January 1985, at 1, 2-3; Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 Mich. L. Rev. 1878, 1886 (1984); Manley, *Fraternal Selectivity v. Jaycees Commerciality*, Fraternal Law, September 1984, at 1-3; Note, *Alcohol and Hazing Risks in College Fraternities*, 7 Rev. of Lit. 191, 193 n.6 (1988); Note, *Freedom of Association: The Attack on Single-Sex College Social Organizations*, 4 Yale L. & Pol'y Rev. 426, 433-44 (1986). *But see* Comment, *Discrimination on Campus*, *supra*, at 2142-47.

Although Petitioner Tiger Inn urged this same conclusion below, the Supreme Court of New Jersey did not address the applicability *vel non* of the right of private association. Inescapably implicit in its holding, however, is either (a) that the legislative policy of the State of New Jersey embodied in the anti-discrimination statute at issue is superior to that right, or (b) that the eating clubs cannot for some other reason invoke the right of private association.

The failure by the court below to provide an explicit justification for its conclusion is at best a subtle affront to the Supremacy Clause and the Bill of Rights. It certainly does not evidence the heightened scrutiny that governmental encroachment on associational rights requires. *See New York Club Assoc. v. City of New York*, 487 U.S. 1, 15-16 (1989). In fact, given the decisions of this Court on the nature of the right of private association and its close match with the nature of the eating clubs, the decision below is a violation of that right.

The decision of the court below advanced as its legal underpinning a line of federal and New Jersey cases purportedly holding that a symbiotic and integral relationship between a private association and a place of public accommodation destroys the private nature of the association. *See Frank v. Ivy Club*, 120 N.J. 73, 104, 576 A.2d 241, 257 (1990); *see also id.*, 228 N.J. Super. 40, 52, 548 A.2d 1142, 1148 (Super. Ct. App. Div. 1988). Commentary has advanced this same argument. *See* Comment, *supra, Discrimination on Campus*, at 2137 n. 127.

The federal cases relied upon to maintain this argument, however, all concerned situations in which one of two important policy considerations played a critical role. Neither of these considerations is present in the case at bar.

The federal cases each involved either: (a) discrimination by a private commercial establishment that was physically a part of a place of public accommodation; or (b) discrimination by a private association of public employees that was closely associated with their public employer. *See Adams v. Miami*

Police Benevolent Assoc., 454 F.2d 1315 (5th Cir.), *cert. denied*, 409 U.S. 843 (1972); *Franklin v. Order of United Commercial Travelers*, 590 F. Supp. 255 (D. Mass. 1984); *United States v. Medical Soc.*, 298 F. Supp. 145 (D.S.C. 1969); *United States v. Beach Assoc.*, 286 F. Supp. 801 (D. Md. 1968); *Pinkney v. Meloy*, 241 F. Supp. 943 (N.D. Fla. 1965). In the first group of cases, the overtly commercial nature of the activity in question both implicated the governmental interest in regulating commerce and failed to implicate any private associational rights. In the second, the activity in question clearly implicated the right to equal access to direct economic benefits from the state, an interest wholly absent in the present case. Without either of these critical considerations, there is no basis to apply the holdings of these decisions as precedent, much less to invoke them to overrule the constitutionally guaranteed right to freedom of association.

There is an additional problem with the New Jersey Supreme Court's conclusion that the relationship of the eating clubs with Princeton University determined that they were not private associations. The right to freedom of association of the members of a college student organization generally entitles the organization to recognition by the students' college. *See Healy v. James*, 408 U.S. 169 (1972).[1] It would be ironic indeed if a group of students could seek the institutional relationship to which freedom of association entitles them only at the risk of destroying any further right to invoke that freedom. As a result, there must be a corollary principle that this relationship cannot itself confer a public character on a private association. *Cf. Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981) (university recognition does not amount to official endorsement of ideas of student organization). Otherwise, the right of private association could effectively have no existence at a college or university campus. *See Healy v. James*, 408 U.S. at 176, 181-82.

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[1] *Healy* dealt solely with the issue of a public university. In New Jersey, however, private universities are subject to state constitutional restrictions that federal law applies to public universities. *See State v. Schmid*, 84 N.J. 535, 553-69, 423 A.2d 615, 625-35, *appeal dismissed*, 455 U.S. 100 (1982).

In *Borough of Glassboro v. Vallorosi*, 117 N.J. 421, 568 A.2d 888 (1990), the New Jersey Supreme Court held that a group of unrelated college students living together and sharing meals was the "functional equivalent" of a family and protected from governmental interference in the form of zoning. It is precisely the family and family style relationships that are the focus of the right of private association. *Board of Directors v. Rotary Club*, 481 U.S. 537, 545, 547 n.6 (1987). There are differences between the group of students in *Vallorosi* and the eating clubs at Princeton, for example, few of the eating club members at Princeton actually live together (as distinguished from many fraternities and sororities). The *Vallorosi* decision nonetheless highlights that the same court's decision in *Frank v. Ivy Club* inadequately considered the nature of the eating clubs, the relationships among their members, and the associational rights they deserve.

POINT II

The Legal Uncertainty Created by the Decision Below Urgently Needs to Be Addressed.

There are two reported cases on whether a relatively small, selective, social organization of college students is a private association entitled to restrict its membership on the basis of gender. These two decisions reached opposite conclusions. *Compare Schkolnick v. Fly Club*, No. 87-BPA-0097 (Mass. Comm. Against Discrimination, March 24, 1990) (Harvard final club was not a place of public accommodation) *with Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990). There will doubtless be further challenges to such membership practices, spurred especially by the latter decision.

There are thousands of such organizations across this country, as noted *supra* and in the petition (at 14). They are virtually all non-profit organizations with limited resources. They cannot afford to litigate their constitutional rights on a case by case basis. Attacks on their membership practices under state anti-discrimination statutes could destroy these organizations simply from the cost of defending their members' right of private association. Even the threat of such litigation is a cost that would not only chill their exercise of that right but could freeze it out entirely. The case at bar provides an efficient and early means to forestall any such nationwide struggle.

It is one thing for a state's constitution to entitle its citizens to broader rights than guaranteed by federal law. It is quite another for a state law effectively to vitiate a right guaranteed by the United States Constitution. The injustice is only compounded when such a result is visited upon students who are sorely limited in their ability to fight for the rights. The best possible lesson for the nation's college and university students would be that federal law stands by their side against the unconstitutional application of state statutes.

CONCLUSION

For the foregoing reasons, the NIC respectfully urges that this Court issue a writ of certiorari to review the decision of the Supreme Court of New Jersey.

Dated: October 31, 1990

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